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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

TOWN CONCRETE PIPE OF WASHINGTON, INC.,

Petitioner,

v.

LABORERS INTERNATIONAL UNION LOCAL 252,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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October 1, 1982

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Questions Presented

1. Under what circumstances may a party to a collective bargaining agreement be considered to have waived its right to binding arbitration?

2. In determining whether parties have agreed to submit a particular dispute to arbitration, is the Court limited to review of the arbitration clause, or may other evidence be considered? Is the Court precluded from determining arbitrability where resolution of the arbitrability issue may constitute a determination of the asserted grievance?

3. Did the Ninth Circuit err in holding that actions by the United States Bureau of Labor Statistics are not "legislation" within the meaning of the collective bargaining agreement?

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	13
1. THE COURT OF APPEALS DECISION IN THIS CASE DIRECTLY CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENCE	13
2. THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS AS A RESULT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT'S DECISION IN THIS MATTER	16
3. THE RESPONDENTS HAVE WAIVED ANY RIGHTS TO ARBITRATION WHICH MAY HAVE EXISTED	19
4. THE COURT OF APPEALS ERRED IN ITS DETERMINATION THAT ACTIONS BY THE BUREAU OF LABOR STATISTICS ARE NOT LEGISLATION	23
5. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE LIMITS OF DEFERENCE TO ARBITRATION	26
Conclusion	30
Appendix	
Certificate of Service	

TABLE OF AUTHORITIES

Cases	Pages
Aluminum Company of America v. UAW, 630 F2d 1340, 105 LRRM 2390 (CA 9, 1980)	21,A6,A13
Atkinson v. Sinclair Refining Co., 370 US 238 (1962)	27,28,A6
Barrentine v. Arkansas-Best Freight System, 450 US 728, 737-38 (1981)	A12
Burns Detective Agency v. Navarro, 274 NYS 2d 314, 63 LRRM 2327 (N.Y. Sup.Ct. App.Div., 1966)	A7
California Trucking Association v. Teamsters Local 70, ___ F2d ___, 108 LRRM 2955 (CA 9, 1981)	22,23,29
Gateway Coal v. United Mine-Workers of America, 414 US 368 (1974)	27,28,A5
Haig Berberian, Inc. v. Cannery Warehousemen, 535 F2d 496, 92 LRRM 2407 (1976)	15,A10,A11
John Wiley & Sons v. Livingston, 376 US 543, 546-47 (1964)	A5
Alfred Lewis Inc. v. NLRB, 587 F2d 403, 99 LRRM 2841 (CA 9, 1978)	21
Ieyva v. Certified Grocers of California, 593 F2d 857, 861 (9th Cir., 1979)	A11

Local 198 Rubber Workers v. Inter Co, Inc., 415 F2d 1208, 72 LRRM 2377 (CA 8, 1969) 22

Newspaper Guild Local 35 v. Washington Post Co., 442 F.Supp. 1060, 101 LRRM 2121 (1979) 21

Pacific N.W. Bell v. CWA, 310 F.2d 244 (9th Cir., 1962) A14

RCA Association of Scientists, 414 F.2d 893, (CA 3, 1979) 16,17,18

Reid Burton Construction v. Carpenters, 535 F.2d 598, 92 LRRM 2321 (CA 10, 1976) 22,29

Savannah Printing Union, 350 F. Supp 632, 82 LRRM 2721 (DC, Southern District of Georgia, 1972) A7

United Steelworkers v. American Mfg. Co., 363 US 564(1960) 26,27,A5,A10

United Steelworkers v. Enter-Prise Wheel & Can Corp.,, 363 US 593 (1960) 26,27,A10

United Steelworkers v. Warrior & Gulf, 363 US 574 (1960) 13,14,16 26,27,A1

Statutes

28 U.S.C. §1254(1) 2
28 U.S.C. §1291 A9
28 U.S.C. §2 25
28 U.S.C. §185 A2,A8

Treatise

Webster's New International Dictionary, 2nd Ed. 25

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, Town Concrete Pipe of Washington, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 7, 1982.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix

hereto. The original opinion rendered by the District Court for the Western District of Washington also appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 7, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

Questions Presented

1. Under what circumstances may a party to a collective bargaining agreement be considered to have waived its right to binding arbitration?

2. In determining whether parties have agreed to submit a particular dispute to arbitration, is the Court limited to review of the arbitration clause, or may

other evidence be considered? Is the Court precluded from determining arbitrability where resolution of the arbitrability issue may constitute a determination of the asserted grievance?

3. Did the Ninth Circuit err in holding that actions by the United States Bureau of Labor Statistics are not "legislation" within the meaning of the collective bargaining agreement?

STATEMENT OF THE CASE

The Respondent, Laborers International Union Local 252 (hereinafter "Union") is a labor organization representing the employees of Town Concrete Pipe of Washington, Inc., the Petitioner, (hereinafter "Company").

The Union and Company were parties to a collective bargaining agreement effective through June 1, 1980. The collective bargaining agreement provided

for binding arbitration. Only disputes involving interpretation or application of this agreement may be submitted to arbitration.

The collective bargaining agreement also contained a cost of living clause. The formula used to determine the yearly wage increase relied on the "COL Index (1967 Seattle Area Base)".

In 1978, the Bureau of Labor Statistics of the U.S. Department of Labor announced to users of the consumer price index that with the release of the January index, the Bureau would publish three consumer price indexes: (1) a revised consumer price index for urban wage earners and clerical workers; (2) a new consumer price index for all urban consumers; and (3) the present unrevised consumer price index for urban wage earners and clerical workers. Users of the consumer price index were advised that

"the unrevised index will not be available after the publication of the June, 1978 index." The Bureau of Labor Statistics also advised users of the consumer price index that "all existing contracts will have to be adjusted or rewritten because of the revision."

The collective bargaining agreement between the Union and the Company contains a "Savings Clause" which provides:

> "Should any part of or any provision herein contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation, or by any degree of a court of competent jurisdiction, such invalidation of such part or portion of this agreement shall not invalidate the remaining portions thereof; provided, upon such invalidation the parties signatory hereto agree to immediately meet to negotiate such parts or provisions affected. The remaining parts or provisions shall remain in full force and effect." Art. 16.

On February 20, 1979, the parties met to discuss the impact of the Department of Labor's revisions to the consumer price index. On March 15, 1979, the company

tendered legal notice to the Union requesting that the parties begin bargaining over the cost of living clause since the clause had been eliminated from the parties' labor agreement due to the Department of Labor's discontinuance of the consumer price index contained in the collective bargaining agreement.

On March 27, 1979, the Company and the Union agreed to commence negotiations for a revised cost of living clause. The Company and the Union met and bargained over the revision to the cost of living clause on April 10, 1979. During the course of the May 14 bargaining session, the Union submitted a proposal of a cost of living adjustment of $1.10. Further, on May 15, 1979, the Union submitted a second proposal, in written form, in regard to the revisions to the cost of living clause. On May 18, 1979, the

Company made a full and final offer to the Union.

On June 12, 1979, the Union requested "interest arbitration." On June 21, 1979, the Company refused interest arbitration and suggested that the issue for arbitration should be whether or not the agreed upon cost of living clause had been eliminated because of the revisions in the consumer price index by the Department of Labor, thereby creating a bargaining duty upon the parties.

On July 3, 1979, the Union filed an unfair labor practice charge against the Company alleging that the Company had refused to bargain in good faith with the Union. In this proceeding, the Union informed the National Labor Relations Board, a federal agency of the United States government, that it agreed with the Company's position that the change in the consumer price index had eliminated the

cost of living clause. Further, the Union acknowledged that "the history of the negotiations shows agreement on the fact that there no longer exists a cost of living clause and negotiations over the extent of the increase to be granted to the employees in lieu of the previous cost of living clause."

On December 13, 1979, the Union notified the Company that it would accept its proposal to arbitrate. The Union suggested that the issues for arbitration were:

1. Whether the cost of living clause had been rendered invalid;

2. The extent of the Company's bargaining obligation;

3. Whether the Company fulfilled this obligation;

4. Whether the Union has the right to strike to secure the wage increase it seeks; and

5. The proper wage rate in the event the parties are unable to agree.

On December 27, 1979, the Company again advised the Union that it was the Company's position that the cost of living clause had been eliminated because of changes in the consumer price index and that the parties had an obligation to meet and bargain over the cost of living clause.

On January 3, 1980, the Union advised the Company that it did not agree that the cost of living clause contained in the contract had been eliminated because of changes in the consumer price index.

The Company refused to submit the issues to arbitration and the Union filed suit.

In September, 1980, the Union moved for a summary judgment. In December, 1980, the Company counter moved for a

summary judgment and relied on the following arguments:

1. FEDERAL COURTS HAVE CONSISTENTLY HELD THAT ARBITRATION IS A MATTER OF CONTRACT AND IT IS FOR THE COURTS TO DETERMINE WHETHER THE PARTIES HAVE AGREED TO SUBMIT SPECIFIC ISSUES TO ARBITRATION.

2. ARBITRATION IS A DISTINCT PROCEDURE FROM COLLECTIVE BARGAINING AND WHERE THE PARTIES HAVE AGREED TO RESOLVE ISSUES THROUGH NEGOTIATION THEY MAY NOT SUBSTITUTE THE ARBITRATION PROCESS TO RESOLVE MATTERS THEY WERE NOT SUCCESSFUL IN RESOLVING THROUGH BARGAINING.

3. THE COMPANY AND THE UNION HAVE NOT AGREED TO ARBITRATION PROVISIONS OF THE CONTRACT THAT HAVE BEEN RENDERED INVALID BY GOVERNMENT OR COURT ACTION, BUT RATHER AGREED TO RESOLVE THESE DISPUTES BY NEGOTIATION. THEREFORE, THE DISPUTE IN THIS CASE IS NOT ARBITRABLE.

4. THE COST OF LIVING CLAUSE WAS RENDERED INVALID BY THE ACTION OF THE U.S. DEPARTMENT OF LABOR, AS A MATTER OF LAW, THEREBY CREATING A CONTRACTUAL OBLIGATION TO NEGOTIATE.

On February 5, 1981, the trial court denied the Union's motion and granted the Company's Motion for summary judgment, and

dismissed the Union's complaint. In that regard, the trial court ruled that arbitration is a distinct procedure from collective bargaining and where the parties have agreed to resolve issues through negotiation they may not substitute the arbitration process to resolve matters they were not successful in resolving through bargaining. Consequently, arbitration is not available because the issue is not arbitrable. Further, the court ruled that where government regulations or court action either make performance impossible or would require the arbitrator to amend the collective bargaining agreement, the disputes are not arbitrable. The trial court apparently found it unnecessary to rule on the fourth ground of the Company's motion. The Union appealed the trial court's decision.

On July 7, 1982, the Court of Appeals for the Ninth Circuit reversed and remanded the District Court's holding with instructions to the District Court to grant summary judgment to the Union, and compelling arbitration of the dispute. The Court of Appeals held that the savings clause of the collective bargaining agreement is a substantive provision of the collective bargaining agreement and thus "presents a question for the arbitrator, not the courts." Additionally the court, in dicta, stated that the savings clause would not apply to this dispute in any event, in that the cost of living clause was not rendered invalid," in the sense of being contrary to law, or legally enforceable ...the action by the Bureau of Labor Statistics is not legislation." Finally, the Ninth Circuit found that the union's attempts to bargain over a cost of living clause "did not mean the dispute is

not subject to arbitration." The court did not discuss whether waiver of one's right to arbitrate could ever occur, and, if so, at what point such a waiver would be found.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS DECISION IN THIS CASE DIRECTLY CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENCE.

The entire collective bargaining agreement should be reviewed in order for a court to determine the arbitrability of an issue. United Steelworkers v. Warrior and Gulf, 363 US 574 (1960). A court should not limit itself to the arbitration clause. The mandate in the United Steelworkers case in deferring to arbitration was clearly limited, arbitration only being appropriate where the questions on which the parties disagree are not

"specifically excluded" from arbitration. The savings clause at issue makes specific exclusions to arbitration. According to that clause, legislation rendering a contract clause invalid will not result in arbitration, but rather in negotiations. Arbitration is merely a matter of contract and a party cannot be required to submit to arbitration disputes which he has not agreed to so submit. United Steelworkers, id. In no Supreme Court cases found is it stated, or implied, that only the arbitration clause should be reviewed in making the determination. To confine court review of a contract to one specific clause and to ignore the contract's other related terms would be to totally disregard contract law and would, in effect, reduce all other contract clauses to a subservient position. The absurd could result from this limited interpretation. A substantive clause in a contract which

expressly excludes that subject from arbitration would be considered arbitrable by virtue of the fact that the express exclusion was written into some clause other than the arbitration clause. It is totally unreasonable for a court to take a contract clause out of context.

Evidence that the parties intended to exclude a particular type of claim from arbitration may be relevant and admissible. Haig Berberian Inc. v. Cannery Warehousemen, 535 F2d 496, 92 LRRM 2407 (1976). That evidence may be found anywhere in the contract, and should not be confined to the arbitration clause.

The Court of Appeals in the present case ruled that only the arbitration clause was to be considered and that other evidence was irrelevant. This holding is in clear conflict with Haig, id., a Ninth Circuit case, and, more importantly, the United States Supreme Court case of United

Steelworkers v. Warrior & Gulf, ibid. These conflicting holdings cannot be distinguished. The savings clause should be read as an aid to interpretation of the arbitration clause. Ignoring the savings clause would result in a false interpretation of the arbitration clause, and require the parties to submit to arbitration disputes which they clearly had agreed not to submit.

2. THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS AS A RESULT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT'S DECISION IN THIS MATTER.

In RCA v. Association of Scientists, 414 F2d 893 (CA 3, 1979), the Third Circuit looked at more than the arbitration clause in order to discover its scope. They also considered a totally distinct document which was executed

contemporaneously with the collective bargaining agreement.

The Ninth Circuit's holdings in the case at bar directly conflict with those holdings of the Third Circuit. The Ninth Circuit refused to look beyond the arbitration clause to discern its scope. In RCA the court not only looked beyond the arbitration clause, but looked to separate documents. The conflict between these two Circuits is clear and must be addressed by the Supreme Court.

In addition, after acknowledging that a resolution of the issue of arbitrability might automatically constitute a determination of the asserted grievance, the Court in RCA stated:

> "The Union contends that the issue we have isolated is properly one for the arbitrator and not for the court to determine because the controversy goes to the heart of the asserted grievance. We cannot agree. While the controversy does go to the heart of the asserted grievance, it does not follow that the court is thereby precluded from discharging its

> obligation to determine whether the parties agreed to submit the particular dispute to arbitration. The Union cannot be couching its grievance in language of a contract construction problem prevent the court from carrying out its duty ...Resolution of the dispute here involves a determination of the presence or absence of terms of the contract, i.e. what the parties agreed to. Such a determination is solely one for the court. (emphasis added)

The problem addressed by the Third Circuit in RCA is on point. The issue of whether or not a contract term exists should be left entirely to the Courts. If it is found that such a clause is present, then an arbitrator may be appropriate under certain circumstances. The Third Circuit held that it is inappropriate for the court to defer to arbitration a question of the existence of a contract term. The Ninth Circuit has done precisely that; they have deferred to an arbitrator the question of whether the cost of living clause exists despite changes in the consumer price index formulation. This

conflict among the circuits can only be resolved by the United States Supreme Court.

3. THE RESPONDENTS HAVE WAIVED ANY RIGHTS TO ARBITRATION WHICH MAY HAVE EXISTED.

In early 1978 the U.S. Department of Labor, Bureau of Labor Statistics announced that the Consumer Price Index (hereinafter CPI) formula was to be revised and that as a result existing contracts which used the CPI would have to be rewritten. The collective bargaining agreement in effect between the parties to this suit used the CPI in the cost of living clause.

In February, 1979, the parties met to discuss the impact of the Department of Labor's revisions to the Consumer Price Index. On March 27, 1979, the Company and the Union agreed to commence negotiations for a revised cost of living clause.

Several meetings occurred during which both parties bargained in good faith and made written proposals. The bargaining ended at an impasse in May, 1979, and unfair labor practice charges were filed by the Union against the Company for failure to bargain in good faith. The Regional Director refused to issue a complaint and the Union appealed, stating in its brief:

> "The Union had already agreed that the [cost of living] clause was eliminated."

The Union continued:

> "Here, the history of the negotiations shows agreement on the fact that there no longer exists a cost of living clause and negotiations over the extent of the increase to be granted to the employees in lieu of the previous cost of living clause."

After losing at the negotiation table and again at the National Labor Relations Board, the Union requested arbitration. Petitioner contends that the Union has expressly waived any right to arbitration

by negotiating and unequivocally stating that the contract term in question no longer exists. See Newspaper Guild Local 35 v. Washington Post Co., 442 F.Supp 1060, 101 LRRM 2121(1979). Arbitration of grievances is a distinct procedure from collective bargaining. Aluminum Co. of America v. UAW, 630 F2d 1340, 105 LRRM 2390 (CA 9, 1980), citing Alfred M. Lewis, Inc. v. NLRB, 587 F2d 403, 99 LRRM 2841 (CA 9, 1978), and one should not be allowed to resolve through arbitration those matters which one was not successful in resolving through bargaining.

Even if the issue at bar is arbitrable, the Union should be estopped from compelling arbitration because of the Company's justifiable reliance on the Union's position that the contract clause was eliminated. The Company expended funds in obtaining counsel to negotiate with the Union about a cost of living

clause. In addition, expenses were incurred as a result of the unfair labor practice charges filed with the National Labor Relations Board. These costs would not have been incurred if the Union had made a demand for arbitration within a reasonable amount of time after the problem surfaced. Any rights that the Union may have had to compel arbitration are estopped because of the Company's reasonable and justifiable detrimental reliance of the Union's previous position.

Waiver is an intentional relinquishment of a known right and a Union can waive its right to arbitration by its actions. Local 198 Rubber Workers v. Inter Co., Inc., 415 F2d 1208, 72 LRRM 2377 (CA 8, 1969), Reid Burton Construction v. Carpenters, 535 F2d 598, 92 LRRM 2321 (CA 10, 1976). California Trucking Association v. Teamsters Local 70, ____ F2d ____, 108 LRRM 2955 (CA 9, 1981). To

determine if intentional relinquishment has occurred, the court must examine the factual setting of the case including the manifest intent of the parties and whether the other party was in any way affected, misled or prejudiced. California Trucking Association, id.

Here the facts reveal that in every means possible the Union manifested an intent to consider the cost of living clause invalid. The Company relied on these manifestations. A waiver of any right to arbitration has occurred.

4. THE COURT OF APPEALS ERRED IN ITS DETERMINATION THAT ACTIONS BY THE BUREAU OF LABOR STATISTICS ARE NOT LEGISLATION.

The parties specifically agreed, in the collective bargaining agreement, to handle invalidation of provisions of the contract due to government action through

negotiations. In accordance with this agreement, the parties did meet and negotiate for the purpose of replacing the eliminated CPI with a new cost of living clause. This action by the parties supports the Company's position that all parties intended that the language of the savings clause be applied; that the cost of living clause had been rendered invalid by legislative action.

The parties' understanding is only further support for that which is abundantly clear. The Bureau of Labor Statistics, a branch of the U.S. Department of Labor, is an extension of Congress. Congress created and delegated specific functions to the Department of Labor, including the duty to:

> "collect, collate, and report at least once each year, or oftener if necessary, full and complete statistics of the conditions of labor and the products and distribution of the products of the same, and to this end said Secretary shall have power to employ any or either of the bureaus

> provided for his department and to rearrange such statistical work, and to distribute or consolidate the same as may be deemed desirable in the public interest..." 29 USC§2.

The Court of Appeals held that the disputed clause is not invalid "in the sense of being contrary to law, or legally unenforceable". But the Court erred in confining the definition of "invalid" to "illegality". Websters New International Dictionary, 2nd Edition defines invalid as, "of no force, weight or cogency." This is the common usage and the proper interpretation of the savings clause. Therefore, when the legislative branch of the government rendered meaningless a contract clause, it was the duty of the parties to negotiate. The Bureau of Labor Statistics Announcement confirms this by stating:

> "All existing contracts will have to be adjusted or rewritten because of the revision (in the CPI)."

A legislative act has invalidated the cost of living clause of the contract and therefore bargaining was warranted. Arbitration would be inappropriate when the contract clearly excludes such an issue from arbitration.

These conflicts justify the grant of certiorari to review the judgment below.

5. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE LIMITS OF DEFERENCE TO ARBITRATION.

The Ninth Circuit's decision in this case reflects the bonafide efforts of the judicial system to promote industrial harmony through deference to arbitration. United Steelworkers v. American Mfg. Co., 363 US 564(1960), United Steelworkers v. Enterprise Wheel & Can Corp., 363 US 593(1960), United Steelworkers v. Warrior & Gulf, 363 US 574(1960), (hereinafter

referred to as Steelworkers Trilogy). It is necessary to examine this policy of deference as it relates to its purpose of reducing labor strife. The presumption in favor of arbitration established by the Steelworkers Trilogy is clearly limited. Arbitration is a matter of contract, and unless the parties have agreed to arbitrate, another form of dispute resolution must be use. Gateway Coal Co. v. United Mineworkers of America, 414 US 368 (1974). Atkinson v. Sinclair Refining Co., 370 US 238(1962).

Despite this express limitation mandated by this Court, it is apparent that the Ninth Circuit has deferred to arbitration even those subjects which the parties have agreed not to arbitrate. The lower courts and litigants urgently need the assistance of this Court in understanding how this presumption of

arbitration can be overcome. Among the issues presented are:

A. WHAT EVIDENCE WILL REBUT THE PRESUMPTION IN FAVOR OF ARBITRATION?

An arbitration is a contract clause, and like all other contract clauses, should be read in context. In order to fully understand the intent of the parties, the entire contract must be reviewed. This basic hornbook law has resulted in chaos in the labor law field because of courts' desires to promote harmony in the work place. Some courts have, in effect, made arbitrability an irrebuttable presumption. This definitely goes beyond the intent of the Steelworkers Trilogy, and clearly defies the language of Gateway and Sinclair Refining.

If arbitrability is a rebuttable presumption, it is essential that lower courts be given direction as to what

evidence can be used to rebut that presumption. The entire contract should be considered. Additionally, the manifested intent of the parties during and after the execution of the contract would be relevant.

B. WHEN DOES A PARTY WAIVE ITS RIGHT TO ARBITRATION?

There seems to be agreement among the circuits that under certain circumstances arbitration can be waived. That waiver can be manifested by a continual disavowal of the existence of the contract, California Trucking Association, id; or by court action Reid Burton Construction v. Carpenters, 535 F2d 2377, 92 LRRM 2321 (CA 10, 1976). This Court must instruct the lower courts of the proper criteria for waiver of arbitration without specific guidelines. Otherwise, the lower courts will continue to apply haphazardly the

rules of waiver, placing unions and employers alike in untenable positions.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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